Supreme Court, U. S.
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No. 79-1652

In the Supreme Court of the United States

OCTOBER TERM, 1979

ALICE MILLER, PETITIONER

v.

MOON LANDRIEU, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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Petitioner contends that the court of appeals erred in affirming the district court's judgment that her claims of wrongful discharge from public employment were time-barred without permitting her an opportunity to present oral argument.

1. In June 1965, petitioner, a white female of the Jewish faith, was discharged from her position as a stenographic secretary for the Housing Authority of the City of Los Angeles (HACLA), which is funded by the Department of Housing and Urban Development. After a hearing, the Board of Commissioners of HACLA upheld petitioner's discharge. She then filed suit in California Superior Court, alleging that the discharge deprived her of the Fifth Amendment right to due process and the First

Amendment right to religious freedom. The Superior Court ruled against petitioner on June 29, 1967, and she abandoned her appeal of that decision (Pet. App. 19).

In January 1971, petitioner filed an action in the United States District Court for the District of Columbia against, *inter alia,* HUD and the Secretary of HUD, alleging that, because she is white, Jewish and female, she was discharged by HACLA and was denied the opportunity to appeal her discharge pursuant to HACLA's personnel regulations. The case was transferred to the United States District Court for the Central District of California, which dismissed the action for failure to state a claim or, in the alternative, as barred by the equitable doctrines of laches and estoppel (Pet. App. 5-6, 19-20).

The Ninth Circuit reversed and remanded on the ground that petitioner's complaint was cognizable under 42 U.S.C. 1981, 1983 and 1985(3) and that the statute of limitations governing actions under the Civil Rights Acts, rather than the doctrine of laches, was applicable to petitioner's claim (Pet. App. 6-7). On remand, the district court again dismisssed petitioner's complaint, holding that the action was barred by the three-year statute of limitations provided by Section 338(1) of the Cal. Civ. Proc. Code (West 1954) (Pet. App. 20). The Ninth Circuit affirmed, noting that petitioner's complaint revealed on its face that it was time-barred, having been filed in 1971 after the claim accrued in 1966, and that petitioner had demonstrated no basis for tolling the period of limitation. *Miller* v. *Harris,* No. 75-2758 (9th Cir. Feb. 24, 1977), cert. denied, 434 U.S. 1065 (1978) (Pet. App. 8-9). The court rejected as "illogical" petitioner's argument that the statute "never began to run in the first place because she was unable to exhaust her administrative remedies," stating that petitioner was obliged to file her lawsuit

without a five-year delay when it became obvious that she would obtain no further administrative relief (Pet. App. 9).

Petitioner filed the present action in June 1978 in the United States District Court for the District of Columbia, asking the court to vacate the California district court's judgment and to consider her original claim. The District of Columbia District Court declined to entertain the action on the grounds of the applicable three-year District of Columbia statute of limitations and principles of collateral estoppel (Pet. App. 20-21).

Petitioner then appealed to the District of Columbia Circuit. The case was initially scheduled for oral argument on December 3, 1979, and notice of argument was sent to petitioner on October 26, 1979 (Pet. App. 10-11).[1] On November 19, 1979, the court of appeals advised petitioner, in response to her motion, that she was entitled to be represented by counsel at the oral argument provided that counsel entered his appearance no later than five days prior to the scheduled date of argument (Pet. App. 12). Subsequently, on November 23, 1979, the court sua sponte informed petitioner that, pursuant to its local Rule 11(d), the case would be considered and decided without oral argument (Pet. App. 13).

On December 10, 1979, the District of Columbia Circuit affirmed the district court's decision per curiam (Pet. App. 1-2). A petition for rehearing was denied on January 21, 1980 (Pet. App. 3).

2. Petitioner argues that the District of Columbia Circuit deprived her of due process by deciding her appeal

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[1]The notice advised petitioner that, pursuant to its local Rule 11, the court could elect to dispense with oral argument (Pet. App. 10).

without hearing oral argument and that the applicable statute of limitations is 28 U.S.C. 2401, which, she contends, has not even begun to run against her wrongful discharge claim because that grievance has not yet been heard in administrative proceedings. There is no merit to either of these contentions.

a. Recognizing that this Court has held to the contrary in *Price* v. *Johnston*, 334 U.S. 266, 286 (1948) (Pet. 11 n.2), petitioner does not contend that oral argument on appeal is an essential ingredient of due process. Rather, petitioner argues that the omission of oral argument is a denial of due process where opportunity for oral argument is provided for by court rules (Pet. 10-11). But petitioner's argument is based on a prior version of the applicable federal rule and on the misconception that federal courts cannot, within the framework of their rules, dispense with oral argument in certain cases.

The procedure followed by the District of Columbia Circuit in this case is prescribed by Circuit Rule 11(d). That rule, as amended on August 31, 1979, provides:

> *Disposition Without Oral Argument.* Whenever the Court, *sua sponte* or on suggestion of a party, concludes that oral argument will not be needed, it may, after causing notice to be given by the Clerk to the parties of that determination, proceed to dispose of the case without oral argument. The determination that a case is to be decided without oral argument must be unanimously made by a three-judge division of the Court after due consideration of the following factors, and any others thought appropriate in the context of the particular case: (1) the appeal is frivolous; or (2) the dispositive issue or set of issues has been recently authoritatively decided; or (3) the facts and legal arguments are adequately presented in the briefs and record and oral argument would not

> significantly aid the Court. Motions for restoration to the argument calendar may be made within five days of the date of the order advising counsel of this Court's determination that the case is to be decided without oral argument. Counsel should be aware, however, that the Court thoroughly evaluated the case before issuance of the order.

The foregoing rule is in complete accord with Rule 34(a) of the Federal Rules of Appellate Procedure, effective August 1, 1979, which provides that oral argument shall be allowed unless

> pursuant to local rule a panel of three judges, after examination of the briefs and record, shall be unanimously of the opinion that oral argument is not needed. Any such local rule shall provide any party with an opportunity to file a statement setting forth the reasons why, in his opinion, oral argument should be heard. A general statement of the criteria employed in the administration of such local rule shall be published in or with the rule and such criteria shall conform substantially to the following minimum standard:
>
> Oral argument will be allowed unless
>
> (1) the appeal is frivolous; or
>
> (2) the dispositive issue or set of issues has been recently authoritatively decided; or
>
> (3) the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument.

In the instant case the court of appeals concluded on "the record, the briefs, and all of the pleadings and proceedings had herein," that the case was of such a

character as not to justify oral argument (Pet. App. 13). Petitioner did not file a motion to restore the case to the argument calendar. Since her case was handled in accordance with the Federal Rules of Appellate Procedure and the District of Columbia Circuit's local rules, there is no substance to her claim that she was unlawfully deprived of a right to oral argument (Pet. 9-12).

b. Equally without merit is petitioner's contention that the applicable statute of limitations is the six-year limitations period provided by 28 U.S.C. 2401 for civil actions against the United States and that that statute has not run on her claims because she has never been afforded the full administrative review of her discharge.

Petitioner apparently recognizes that even if 28 U.S.C. 2401 were the applicable statute of limitations, it was exceeded by her failure to institute the present action until 1978, unless the statute was tolled. As the Ninth Circuit observed (Pet. App. 9), the statute of limitations was not tolled by any lack of full administrative review, since petitioner was obliged to file her lawsuit within the applicable statutory period once it became obvious that she would be afforded no further administrative relief.[2]

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[2] *Crown Coat Front Co.* v. *United States*, 386 U.S. 503 (1967), on which petitioner relies (Pet. 15), has no bearing on this issue. There this Court held that where administrative proceedings pursuant to the "disputes clause" in a government contract extended beyond the completion of the contract, the contractor's right to bring a civil action against the United States accrued when the administrative action was final. There were no ongoing administrative proceedings that tolled the running of the statute of limitations on petitioner's claim.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

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